ALASKA STATE LEGISLATURE
SENATE RESOURCES COMMITTEE
January 29, 2001
3:35 p.m.

MEMBERS PRESENT

Senator John Torgerson, Chair
Senator Drue Pearce, Vice Chair
Senator Rick Halford
Senator Robin Taylor
Senator Georgianna Lincoln

MEMBERS ABSENT

Senator Pete Kelly
Senator Kim Elton

OTHER MEMBERS PRESENT

Senator Loren Leman

COMMITTEE CALENDAR

Department of Law: Status of Alaska's resource cases

WITNESS REGISTER

Ms. Barbara Ritchie, Deputy Attorney General
Civil Division
Department of Law
P.O. Box 110300
Juneau AK 99811
POSITION STATEMENT: Commented on resource cases.

Ms. Joanne Grace, Assistant Attorney General
Department of Law
1031 W 4th Ave., Suite 200
Anchorage AK 99501
POSITION STATEMENT: Commented on resource cases.

ACTION NARRATIVE

TAPE 01-4, SIDE A
Number 001

CHAIRMAN JOHN TORGERSON called the Senate Resources Committee meeting to order at 3:35 pm and announced the committee would hear

an update by the Department of Law of the state's resource cases.

MS. BARBARA RITCHIE, Deputy Attorney General, Department of Law, said her main role today was to introduce Ms. Joanne Grace, Assistant Attorney General, head of the statehood defense section.

MS. JOANNE GRACE said she would focus primarily on the cases that have undergone the most change in the last year, like the Katie John case and the Glacier Bay case, which really involve all of Southeast Alaska. She is getting ready to file another case within the next day or two on the roadless directive for the Tongass National Forest that she would comment on, also. She explained:

> The Katie John case - we appealed the final judgment in that case exactly a year ago and after a few months we asked the Ninth Circuit to consider the case 'en banc' rather than to consider it again with just three judges. In the Ninth Circuit that means 11 judges hear the case instead of just three judges. Ninth Circuit agreed to hear the case en banc and we briefed it and argued it. So we're now before the Ninth Circuit again. I would say we're at a really critical stage in this case not only because it's nearing the end of its existence, but also because having survived for 10 years, the case is now intercepting a distinct trend in Supreme Court case law.
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> The Supreme Court more and more recently has been willing to identify and precisely define limits on Congress's authority to interfere with traditional state functions. The case law that's coming out of the Supreme Court on federal/state balance of power issues is much different today than it was 10 years ago. So our argument in the Katie John case is based on one of the issues the Supreme Court is finding particularly important these days. It's called the Clear Statement Doctrine.
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> Under the Clear Statement Doctrine, a federal court will not assume that Congress intended to take over a traditional state function unless Congress has made it unmistakably clear that's what it intends to do. So it's absolutely plain to anyone reading the act. The reason is that Congress will not shift the balance of power between a state and the federal government lightly. You are not going to assume Congress intended to do that.
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> This is a doctrine that developed out of a 1991 case called Ashcroft v. Gregory. In that case the issue before the court was whether the Missouri constitution

that mandated that state judges retire at age 70 violated a federal act that prohibited age discrimination. The court looked at that issue and said it's a particularly state function to define the qualifications of state officials, particularly state judges. It's not something the federal government normally involves itself in. The Age Discrimination Act had an exception in it for appointees on a policy making level. The court said it is not clear whether state judges fit into this exception or not. So we are going to refuse to find that Congress intended to designate the qualifications of state judges because Congress hasn't made it absolutely clear that that is what it intends to do. The court also didn't seem to think that Congress would have that authority even if that had been its intent.

So this is the doctrine we are arguing in the Katie John case. Our argument is that federal takeover of fisheries management on most of Alaska's navigable waters is an assumption of a traditional state authority and, therefore, the court could not find that Congress had that intent unless Congress made that unmistakably clear in the language of ANILCA (Alaska National Interest Land Claims Act).

There's a lot of good argument on our part that fisheries management is a traditional state function. The U.S. Supreme Court has said for 150 years that states take title to the land underlying navigable waters at statehood because the state has dominion over those waters. The state has an obligation to manage the waters in the resources in trust for the public for fishing and transportation and other public uses. Therefore, the state has an obligation to conserve those resources which means it has an obligation to limit uses by setting seasons, means and methods, bag limits, and things like that. That has always been understood to be a state function.

So our argument in the Katie John case in this appeal is because this is a traditional state function, it has to be unmistakably clear in ANILCA that Congress intended the federal subsistence board to have authority over navigable waters where the United States has reserved a water right. Our position is that that is not unmistakably clear in ANILCA. If Congress had wanted to include navigable waters subject to a reserved water right, Congress would have said that. It wouldn't have

done it in the roundabout way that the United States has argued. It's obviously not clear from the statute given the position the parties have taken in this case.

The United States took the position in the beginning of the litigation that the statute did not clearly include navigable waters and, in fact, took the position that it clearly did not include navigable waters. When the United States flipped its position three years into the litigation, it didn't change its mind about the clearness of the statute. It didn't say we were wrong; actually it's absolutely clear in the statute that navigable waters were intended to be included. It simply said the statute is ambiguous. We can't tell from the statute whether Congress intended to include these navigable waters, but as a federal agency, it's our duty to interpret this statute and resolve ambiguities - and we think it's reasonable to interpret it to include certain navigable waters.

The Alaska Supreme Court in the Totemoff case found that it was clear those navigable waters were not included in the language of the statute and that Congress did not intend to include those waters. In the original Ninth Circuit case, the dissenting judge, Judge Hall, looked at the statute and said it's not clear that Congress intended to include these waters. It's not our place as judges to decide that they should be included. Congress has to do it. Even the two judges who decided the case against the state did not find the language to be clear. Those judges said we can't tell what Congress meant from the language in statute. We can't tell what Congress meant from legislative history. We'll look to the federal agencies' interpretation. We find this federal agencies' interpretation to be reasonable.

But under the Clear Statement Doctrine that the Supreme Court applies, it's not enough that it's a reasonable interpretation. It has to be unmistakably clear from the language in statute. So that's the argument that we've made in this second appeal on the Katie John case. The timing of this turned out to be fortuitous because we argued it on December 20 and only two weeks later the United States Supreme Court issued a new decision in a different case applying the Clear Statement Doctrine.

That case, I'm sure you heard about it on the radio - it's a really landmark case for states. It's called the

Solid Waste Services of Northern Cook County v. U.S. Army Corps of Engineers. It's a case where the issue was whether the Corps of Engineers has authority to regulate intrastate waters. In this case it was an abandoned gravel pit where there was some migratory waterfowl and the question was whether it was the Corps of Engineers authority under the Clean Water Act to issue dredge and fill permits [indisc.] to those waters. They had issued regulations stating that their authority extended to intrastate waters as long as there were migratory birds that used that water as habitat.

The Supreme Court looked at the case and said it's a traditional state function to regulate intrastate waters. It's not clear from language of the Clean Water Act that Congress intended these agencies to extend their authority that far. It's unclear. Also, again the court seemed to think that if Congress had made that clear, Congress's commerce clause authority probably didn't extend that far. So, it refused to interpret the Clean Water Act to give the Corps of Engineers authority to regulate intrastate waters.

We just think that the climate is right for the kind of arguments we're making in the Katie John case. The Court actually has another case before it now under Congress's spending clause authority. It's an Alabama case and the issue in that case is whether the state's English proficiency requirement for driver's license violates Title 6 of the Civil Rights Act. Again, it's a clear statement doctrine argument that the state is making. It has to be clear that Congress is intending that statute to apply. So, this is definitely an area a lot of the Supreme Court is focusing on. It's cutting back on the general understanding of what Congress's authority is to take over traditional state functions and it's refusing to interpret laws to have the effect of shifting state/federal authority unless Congress has made it perfectly clear that that's what it intends to do.

Not predicting that we're going to lose the Ninth Circuit case and, therefore, the Supreme Court is going to hear this, but I'm assuming the Ninth Circuit is following this trend and is well aware that it needs to follow Supreme Court authority. If it doesn't, it seems to me this is the kind of case that the Supreme Court would be interested in hearing - partially because it involves this issue of state/federal authority and also because,

at this point, it would be an en banc decision and probably with a dissent and that's the kind of case that the Supreme Court is more likely to take.

Number 899

SENATOR TAYLOR thanked her for the explanation and asked, "Judge Holland's opinion in the Babbitt case where he said that Congress in ANILCA had not provided any authorization for creation of regulations and hoped they must have intended to do so. That seems directly contrary to the Clear Statement Doctrine."

MS. GRACE replied, "It is obviously completely contrary to the Supreme Court law in this area and I don't believe that he had any authority for making that statement."

SENATOR TAYLOR responded that that was the case the Department dismissed in the final hour and asked if there is opportunity at this juncture to reopen that and ask the judge in light of current law to reconsider that decision.

MS. GRACE answered, "The state agreed to dismiss that with prejudice and we would not be in a position to bring that ever again. That's not to say that the issue couldn't arise again, but the state couldn't raise it directly in a new case."

Number 1000

SENATOR TAYLOR said he thought there was some authority and added:

> An executive on behalf of the state cannot diminish the sovereignty of that state in their unilateral action. In other words, the executive making the decision to instruct the Attorney General to dismiss the case significantly impacted the sovereignty and the equal rights, if you will, of the people of Alaska - not only on under their constitution, but under the federal constitution. And I don’t think that's an authority or a right that an elected governor has. And I think there is some case law on the subject. As a consequence, if you could get back to me, I'd appreciate it, because that may very well provide, if not this administration, certainly the next administration, the opportunity to revisit that issue even though I realize the executive and the attorney general consented to a dismissal of the case against us. I don't believe they had any authority to diminish the sovereign rights of the people of the State of Alaska by that unilateral action.

SENATOR LINCOLN said she had been asked the following question a

number of times and would pass it on to Ms. Grace:

> As you know, Ms. Norton has been nominated for Secretary of Interior and listening to you describe the events that have lead us to this point in time; - you know that Ms. Norton was also involved in the, - I'm not sure what the term is, for a brief for the subsistence issue and was quoted in the media that she would not be involved in this issue for a year. I don't know what that means, but if the courts don't rule in your favor, then how do you view Ms. Norton? Should she be confirmed? How do you view her nomination or her role in resolution of this issue?

MS. GRACE answered that she didn't know what Ms. Norton's position would be, but presumably she would be in a position to reinterpret the law. The Department of Interior is not bound forever by its position on any issue as evidenced by the fact that it changed its position on this very issue after President Clinton was elected. "I would be somewhat surprised if any new administration would do that very lightly. I would not expect the Department of Interior to change its position on this issue without a lot of consideration."

SENATOR LINCOLN asked if that was an avenue the Department of Law would pursue.

MS. GRACE replied that the Department of Law would probably not do that on its own. That would be a policy choice by the governor. She has had no indication that they would try that.

SENATOR TAYLOR noted that the governor had made statements on the roadless issue and asked when the Attorney General's office would be filing suit.

MS. GRACE said the Department would file a complaint tomorrow or the next day. She said she could summarize the case for the committee although she hadn't worked on it personally.

CHAIRMAN TORGERSON asked when the court finally put the Ashcroft v. Gregory in place as the Clear Statement Doctrine.

MS. GRACE replied that the decision was issued in 1991:

> The Supreme Court has applied it three times, because of that decision that just came out a couple of weeks ago. In one decision the court found that a state's foreclosure laws fell under a state's traditional authority and it refused to find that federal bankruptcy laws usurped the state's foreclosure laws, because it

found that the state's interest in the stability of title to lands within its state was a traditional state function and, therefore, the Clear Statement Doctrine should apply in that case. And then there was a case involving the issue of whether the American with Disabilities Act should apply to state prisons. The state in that case argued that the Clear Statement Doctrine should apply. The court said, assuming that the Clear Statement Doctrine should apply, we think that state's regulation of its own prisons is a traditional state authority. But we think the federal law very clearly intends the American with Disabilities Act to apply to state prisons.

So I think that those three cases along with the Corps of Engineers, the Clean Water Act case demonstrate that the court is being fairly liberal in defining a traditional state authority. I don't think there's really any question as to whether state management of fisheries and navigable waters is a state function. That is not a tough argument to make. I think the court is being fairly generous in finding state regulation in the particular cases that have come up to be traditional state functions that federal laws usurping those functions would be a dramatic shift or enough of a shift in state/federal authority to require Congress to be unmistakably clear.

CHAIRMAN TORGERSON said he found it interesting that we're not taking it on as a state's right issue instead of a loop hole. He asked Ms. Grace to describe the roadless case.

MS. GRACE said:

The roadless case is based on a directive that was published in the federal register on January 12 that prohibits road construction, reconstruction, and timber harvest in areas that are called inventoried roadless areas. This means for the Chugach National Forest that 98.9 percent of the forest will be closed to road construction, reconstruction, or timber harvest and in the Tongass, 90 percent of it will be. The state's position on this is that this amounts to defacto wilderness status of these areas by executive action.

She understands that the core of the state's claims will be that the roadless directive permanently eliminates processes for land use planning that Congress has

required under federal law so that, for example, Congress has provided in the Wilderness Act that there will be no more wilderness designation without Congressional approval. Congress has provided in the National Interest Lands Conservation Act that no public lands can be withdrawn over 5,000 acres without Congressional approval. Congress has provided in the National Forest Management Act that there are certain processes that the Forest Service must go through for land use planning including such things as considering the unique factors of a particular forest, for example in the Chugach the one million acres of dead spruce and the increasing public use of the forest that might call for increased trails and roads. Also, I think, as I understand it, that Act also requires that that the Forest Service consider input from local communities and from the state. The Multiple Use and Sustained Yield Act requires that the lands be used for multiple purposes, but the roadless directive is so extensive that it eliminates almost all uses. I think the state's complaint is going to have two or three other counts. It's not in a final draft at this point, so I don't have a copy to give you, but our intention is to file it by Wednesday.

CHAIRMAN TORGERSON asked if she would be handling that case.

MS. GRACE replied that Ms. Elizabeth Barry was handling the case.

SENATOR PEARCE asked where the case would go first.

MS. GRACE replied that it's going to be filed in federal district court in Alaska. The United States always gets 60 days to answer, she said. She thought that there would also be interveners.

Number 1603

SENATOR PEARCE asked what was the legal status of a directive on the federal register.

MS. GRACE replied that she didn't know if it's a regulation or an executive order.

SENATOR TAYLOR asked why they didn't file a direct action suit like the state did in the Southeast waters case.

MS. GRACE explained that the kinds of cases the Supreme Court will take as regional actions, even though technically it will consider actions between a state and the United States, are really much narrower than that and usually involve boundary disputes between states or coastal boundary disputes between a state and the United

States. She didn't believe that was the kind of case the Supreme Court would take as a regional action.

SENATOR TAYLOR asked if Ms. Barry was working with any of the other western attorney generals on this issue.

MS. GRACE answered that she was working with an assistant attorney general who is handling the case in Idaho, Steve Strack. She didn't know about Washington. Western states generally work together.

SENATOR TAYLOR remarked that he had been reminded by his friends in the placer mining business that BLM has now come out with new [indisc.] making directives also, which may have devastating impacts on our placer mining industry as far as the amount of money that has to be paid up front each year for a claim. We set up a bonding process for placer miners, but it's apparently not adequate and we're not recognized in BLM. He added, "It would be very costly and probably drive a good portion of them out of business." He wanted to know if her department was aware of that.

MS. GRACE replied that hadn't come to her attention, but they have a separate section in the Attorney General's office, the Oil, Gas and Mining Section handles those issues.

MS. GRACE said she wanted to talk about a Southeast lands case. Three major things have happened since the last legislative session. The first thing is that the Supreme Court granted the State of Alaska's motion to take the case as an original action. This means, essentially, they accepted the state's complaint. She continued:

> The United States answered it. That happened in June. In October, the court appointed a special master to hear evidence in the case. This is an extremely important part of the case, because the Supreme Court, even though it will sit as an original court in rare cases, it doesn't sit a trial. So it appoints a special master to hear the evidence that we have to present, possibly come up to Alaska, take a look at the Alexander Archipelago, and take a look at Glacier Bay, and make a written recommendation to the Supreme Court. This kind of recommendation carries a lot of weight with the court.
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> The court appointed, in October, Professor Gregory Maggs from George Washington University Law School. He has a very impressive resume'.
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> Attorneys on the case are going to Washington D.C. and meet the special master and go over the case.

The third thing that happened is that we filed the motion with the Supreme Court asking to amend the complaint to add a fourth count. The Supreme Court granted that motion very recently. I wanted to explain this fourth count to you because it is different than the others. It's not a self evident kind of claim. In general, this is a quiet title action to submerged lands in Southeast Alaska. It's a boundary dispute with the United States about where Alaska's boundaries begin and where the United States boundaries end. In general, under the Submerged Lands Act, a state's boundaries are measured from its legal coastline. The legal coastline is defined as the line of mean low water where the coast faces the open sea and the line demarking the seaward limit of inland waters. Inland waters are, essentially, internal waters of the state. One of the state's arguments in this case is that all of the waters of the Alexander Archipelago are inland waters. Those are all of Alaska's waters and the coastline skirts the western edge of the Alexander Archipelago and our boundary is three miles out from that line.

We had in our complaint originally, a count that alleged that all the waters of the Alexander Archipelago are inland waters. You can see this, by the way, on the second map in here that is labeled exhibit 1.

The United States claims that Alaska's boundaries only go three miles out from its natural coastline. So there are these pockets and enclaves within the Alexander Archipelago that are marked in red on this map that are not state waters. Those are not within the state boundaries of Alaska.

We had in our original complaint a claim that these are inland waters because they are historic waters. The United States Supreme Court determines what are inland waters. And the Supreme Court relies on an international treaty called the International Convention on the Territorial Contiguous Zone. It's a treaty that lays out rules for how countries define their boundaries vis a' vis other countries. So, under the convention, if the United States has historically treated waters as inland waters of the United States and if other foreign nations have acquiesced in that characterization, then those are inland waters of the state when the state becomes [indisc.] And we have evidence that the United States treated the waters of the Alexander Archipelago as waters

of the United States as early as 1903 in the Alaska Boundary arbitration between the United States and Canada which was an arbitration to draw the boundary between the United States and Great Britain. It was an arbitration to determine the boundary between Alaska and Canada.

The United States took the position in that arbitration that those were inland waters of the United States, not open to vessels of foreign nations. Great Britain acquiesced in that characterization - as did Norway. We have evidence that the United States continually took that position until 1971 when they published these charts that show the doughnut holes. But that claim depends on us essentially proving the subjective intent of the United States. We have to prove what the United States thought. We have to prove that they continually thought that and we have to prove that foreign nations agreed with that.

So we came up with a second theory that is completely objective and doesn't depend on what the Untied States thought. This is based on the theory that Southeast Alaska is made up of juridical bays. Juridical bays are simply legally defined bays. This comes from the convention. Under the convention, if a bay meets the definition of a juridical bay, then it is inland waters owned by the state. End of the case. So, if you look at the fourth map in here, the one entitled juridical bays, you can see that you may not have realized that southeast Alaska was made up of two large bays and two small bays, but, in fact, it is. There is the north southeast bay, that we designated in green, that goes from Cape Spencer down to Coronation Island and the south bay is Coronation Island down to Cape Fox. There is a third bay that is Sitka Sound and the fourth bay is Cordova Bay.

If we can establish that these bays meet the definition of juridical bay under Article 7 of the Convention, then these are inland waters for purposes of Alaska's boundary. The requirements for a juridical bay are essentially two. The first requirement is the bays must be well marked, deeply-penetrating indentations containing land-locked waters. This is not a difficult test for us to meet because of the islands that are in the mouths of these bays. Land-locked means essentially that the water has to be surrounded in three directions by land. If you look at the water areas of Southeast Alaska, most of those areas are surrounded on four sides

by land. Also, it must provide protection to a mariner on at least three sides. One side can be the open sea, but it must provide protection on three sides. The reason for this is that, again, the convention is an international document and the idea is that inland waters are so much a part of the land of the sovereign that they should be within the boundaries of the sovereign. They shouldn't be considered open seas. The idea is that a mariner traveling in these waters would know that he had infringed on the area of a sovereign nation.

Southeast Alaska, it seems to us, clearly meets that definition. Coastal towns in Southeast Alaska are so much a part of the water; there's such a close affinity between the towns of southeast Alaska and the water that it's ridiculous to think of this area as being anything but within the boundaries of the state of Alaska. It's O.K. that part of the indentation of this bay is made up of these islands, of Kuiu Island, Mitkof Island, and Kupreanof Island. Under the terms of the convention, if islands can be assimilated to the mainland, they fit that geographic formation. In other words, these islands are so large and so close together and have such narrow and shallow straights between them, that the court will consider them to be assimilated with the mainland for purposes of defining these bays.

The second requirement for defining a juridical bay is that the bay has to meet the semicircle test. What that means is that the bay must be as large or larger than a semicircle whose diameter is the line across the mouth of the bay. In this case, again, having the islands in the mouths of the bay really helps us, because the lines that close the bay do not have to go from headland to headland. They can go from headland to the island and from the island to the bottom headland. So if you look at the map, for example, the north bay we've designated, there's only two small closing lines. If you add the length of those two lines together the semicircle only needs to have a diameter of that length. You can see the bays easily meet that requirement.

The new claim we have added to our case, the court has accepted it. The special master has asked us all to come to Washington D.C. in February and come up with a management plan for the case. We already had discussions with the United States and have come to terms on what we're thinking in terms of a schedule with the case. We

expect that we will have a trial in the case probably, we hope, in Anchorage, as opposed to Washington D.C. or some place else in the summer of 2002 or 2003 depending on whether part of the case is resolved on summary judgment just on pleadings. Then we would expect that the special master would issue a report within six months or a year of the trial and we would have briefing before the United States Supreme Court.

Number 2039

SENATOR TAYLOR said he had been told for many years by the U.S. Forest Service representatives in Southeast that they had documentation which indicated that they had reserved the water rights of the Tongass at some point in time. He asked, "Pursuant to our discussions, I requested that documentation from the U.S. Forest Service in July and I have had absolutely no response to my letter and wondered if you had in the discovery process."

MS. GRACE replied that they are just starting the discovery process and hadn't received any documents at all. She told members:

> We have a lot of evidence that they have not treated these waters as if they are within the Forest Service. The Solicitor of the Department of Interior issued an opinion in the '50s saying these are not Forest Service waters. We don't manage them. And we have other evidence from the Statehood Act discussions and from some lighthouse reservations when they were rewrote; I take it from the answer that the United States filed in this case. The only thing I can infer from their answer is that they consider the marine water of the Alexander Archipelago to be part of the total ecosystem of the forest. Therefore, retention of those submerged lands were necessary when the forest was created, because you can't separate the waters from the forest for purposes of the forest. That's about as well as I can articulate what I've understood their theory to be.

SENATOR TAYLOR said he had been informed that this was a document and not made up out of someone's definition of ecosystem. Apparently, they told Ms. Grace the same thing.

CHAIRMAN TORGERSON asked if the fourth complaint would slow the overall case down on our original complaint.

MS. GRACE replied that it didn't, at all.

TAPE 01-4, SIDE B
Number 2320

MS. GRACE continued:

> The special master was appointed in October and we informed the special master and the United States immediately that we intended to amend the complaint. He had already scheduled this case management conference for February and so, what we did was share our motion with the United States ahead of time, before we filed it and the United States looked it over and said we won't oppose this if you take certain arguments out of your motion. So, we did take the arguments out, because the non-opposition of the United States was very important in getting the Supreme Court to grant the motion. The Supreme Court granted the motion very quickly. It didn't refer the motion to the special master as it usually does in these cases, I think because the United States didn't oppose it. We don't think it slowed the case down at all.

CHAIRMAN TORGERSON asked if the United States was represented by people in Alaska or in D.C.

MS. GRACE replied that the United States is always represented when it's in the Supreme Court by someone in the Solicitor General's Office, the branch of the Department of Justice that handles Supreme Court cases. So Jeff Maneer from the Solicitor General's Office, the person who's handling the Microsoft appeal before the Supreme Court, is handling this case. And also somebody from the Appellate Division in Washington D.C. is handling it, an assistant attorney general in Anchorage, Bruce Landa, who handles environmental cases is on the case and also the United States has on contract another retired Department of Justice Attorney in San Diego. So there's four people handling it for the United States, one of whom is from Alaska.

MS. GRACE said that those are the federal relations litigation cases that are active right now. She wanted to comment on some of last year's questions on 17 B easement terminations, because that looks like it's becoming active, as well. She said:

> These are easements that were created when the federal government conveyed land to Native corporations. Certain easements were retained so that the public would have access to publicly owned lands and major waterways. The BLM promulgated regulations that provided that easements that were not being used for the purpose for which they were created would be terminated by December 18, 2001. The BLM has now begun this process and is now

investigating which easements are not being used for the purpose for which they were created. The regulations say that among other things that it will terminate easements for which there were no reasonable alternative if there is no evidence of present existing use.

This is a concern for the state for a couple of reasons. One is that I think it's not necessarily true that because easements haven't been used by now or haven't been heavily used by now, they will never be used. We are talking, again, about access for which there is no reasonable alternative.

The second concern is that many of these easements have never been marked or maintained and that may be a reason why there is no evidence of present existing uses - because BLM has never marked many of them or maintained any of them. Some of them exist only in a very intangible sense. So, the process right now is that the BLM is, at this point, looking into present existing uses on 17 B easements. It will not announce before December 2001 that it intends to terminate any easements. At that point it will begin identifying easements that it intends to terminate and there will be public notice and there will be a chance for comment before termination and there will be a chance for an appeal. Terminations will not begin until December 2002. I am sure state agencies will be following these terminations and we'll see what kind of designations they make.

CHAIRMAN TORGERSON asked if she thought that policy would change with the new administration.

MS. GRACE said it depends on what comes to the attention of the administration.

CHAIRMAN TORGERSON said he thought for them to terminate our easement because of non-usage is plain garbage, because they haven't marked or defined them. In some cases, we've been barred from using them.

Number 2142

SENATOR HALFORD asked if there was any provision that allows for termination.

MS. GRACE answered there is not and said:

> There is no requirement for use to set the easements up to begin with. The idea was we have this public land and the pattern of ownership is going to change so that there will be no way for the public to get to the public land or major water ways and, therefore, the United States will retain the easement. It was enough, according to the Department of Interior Board of Land that there might be some future use. When they were created that was enough - to find it necessary to retain the easements, but apparently that has no place in the decision to terminate. Future use has no place in the decision to terminate them.

SNEATOR HALFORD said he had met with federal agents on this issue and they were also terminating some easements where the public land to be accessed by the easement was no longer going to be public land. For example, the Native corporation that had the land over which the 17 B went ended up, because of other shortages and trades back and forth, taking the parcel the access was to.

MS. GRACE answered that there was no reason for an easement in that kind of case. The Alaska BLM has information about these kinds of terminations on their website. It's probably not going to be clear whether this is something to get concerned about unless we see a proposal for termination.

SENATOR LINCOLN asked how many easements she was talking about.

MS. GRACE said she had no idea and BLM probably didn't either, since they were taking a year to figure it out.

CHAIRMAN TORGERSON said he had requested that information from our State Division of Mining, Land, and Water.

SENATOR HALFORD asked if all the 17 B easements were now closed as far as the transfers made. They had to be on the original transfer to the Native corporations.

MS. GRACE answered if he was asking if BLM could create an easement after the land had been conveyed.

SENATOR HALFORD asked if once they withdraw a 17 B easement, it's his understanding there's no way it ever comes back. It's a one way process. They are reserved at the time of transfer and that's the only time it could be reserved and once the transfer occurred, they could never be created again.

MS. GRACE said that is accurate. They have to retain the federal interest. It's theoretically conceivable that they could condemn an easement, but ANCSA doesn't provide for that. The process that

BLM foresees is that after they have a final judgment to terminate an easement, they'll record the disclaimer, disclaiming whatever interest they had in the easement. Then the private land owner, the native corporation will have sort of a full bundle of sticks. At that point it would be too late.

SENATOR HALFORD asked "if the creation of a 17 B easement - and we found that RS2477s belong to basically anybody - is there any private course of action for an individual who may have determined that they were dependent on a 17 B easement which is proposed to be deleted.

MS. GRACE replied that she thought an individual who could state some interest in the easement would have a cause of action.

SENATOR HALFORD asked if the state would.

MS. GRACE answered that it's more difficult for the state because the state would have to allege standing to bring an action.

SENATOR HALFORD interjected, "if the parcel of public land was state land that the 17 B easement went to."

MS. GRACE replied,

> That possibly would give the state a stronger interest. It's difficult for the state to file a lawsuit against the United States on behalf of the people of the state. That's called "parens patriae." States can do that in general, but it's difficult to do it against the United States, because federal courts consider the United States to be the ultimate parens patriae and the state wouldn't have standing to question the actions of the ultimate patriae - because the United States upholds the interests of the state.

SENATOR HALFORD asked if there were some holes in that doctrine.

MS. GRACE replied not that she knew of, "but if the state could allege some state interest…"

SENATOR HALFORD said the state could have interest in selling the land.

MS. GRACE answered if the easement were to state land, we'd have a much better case, especially if it were to a major waterway, too.

SENATOR HALFORD said the next question is "State submerged land is state land."

MS. GRACE said that was right, but a major waterway and navigable water are not necessarily the exact same.

SENATOR TAYLOR asked if a parcel of state land sits on the other side of a parcel of corporate land and an easement goes through there, that would be protected under 17 B, and if that easement is removed at the request of the owner of that property, then there is no access to cross that property or right of access to get to the state land.

MS. GRACE said, "Her understanding is that they are not going to terminate easements that lead to a completely isolated piece of land even without evidence of present existing use, but they will terminate without evidence of present existing use an easement for which there is no reasonable alternative."

She tried to clarify her answer by saying they will not terminate an easement to an isolated piece of publicly owned land. She thought that meant "the only way" regardless of the lack of evidence of present existing use. They will terminate for lack of evidence of present existing use and easement for which there is no reasonable alternative.

SENATOR HALFORD asked, "If the state owned the mountain tops and the only access that can ever be built into a road is a 17 B easement, but you could on a map at least look through a series of state owned parcels and come down across the mountain tops and glaciers to get there, then they will go ahead and terminate it because there is some theoretical map connection. Is that what you're talking about? I'm trying to get the distinction."

MS. GRACE responded that they really need to wait and see what the BLM has in mind. They are drawing a distinction between easements to isolated parcels and easements for which there's no reasonable alternative.

SENATOR HALFORD asked, "If that isn't one of the criteria for the creation of 17 Bs in the first place. He said, "I thought that in order to get the 17 B there had to be a determination on it - that that was necessary to have access to the public lands or public waters involved. Some people think there were 17 Bs that should have been, but weren't. So, you had a one-shot deal and now there's a second shot to reduce it further."

MS. GRACE answered that it seems to her that distinction is vulnerable to a challenge of being arbitrary and capricious.

SENATOR HALFORD asked, "If they withdraw the easement and take that action and the documents are there - and we now have basically, because we know through the Gulkana case that we own subsurface estate that they have transferred in patent to third parties

because they did it before the Gulkana case went forward. What's our avenue to go back?"

MS. GRACE answered, "Congress. BLM couldn't do anything about that. BLM is powerless, because once they have conveyed it, they have conveyed it."

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SENATOR HALFORD said that means the state should be involved in the legal action to stop that from happening.

MS. GRACE answered that she didn't think it was happening after Gulkana.

SENATOR HALFORD said he was talking about 17 Bs. He used Gulkana as an example of the state's subsurface rights, but once you've transferred the full bundle of rights, BLM can't take it back.

MS. GRACE asked him if he thought the Department of Law hadn't been sufficiently involved.

SENATOR HALFORD said that wasn't it. He wanted to make sure when it gets to the point that they are actually considering giving a specific easement away, that as an interest to the state of Alaska that we be involved not after the fact, but try to enjoin the action before it happened.

MS. GRACE answered that she thought the Department of Fish and Game and the Department of Natural Resources would watch these very closely.

CHAIRMAN TORGERSON asked if they were involved in any 17 B litigation right now.

MS. GRACE answered they weren't.

CHAIRMAN TORGERSON said a case had been filed in Seldovia over that 17 B easement and asked why we aren't part of that.

MS. GRACE said she wasn't aware of it and didn't know the answer.

CHAIRMAN TORGERSON said it had to do with motorless versus a walking trail fight between residents, BLM and Native corporations.

MS. GRACE said she thought she knew this situation, but she couldn't tell him what their involvement is right now.

CHAIRMAN TORGERSON said that was a far-reaching one, if the state doesn't get involved in it pretty quick. There's no solution that he's seen besides sticking with the original agreement.

SENATOR TAYLOR said they could use eminent domain to acquire back rather than have to pay for rights-of-way across private land.

MS. GRACE said she thought they could do that. If it's for a public purpose, the state has that authority to take private property as long as it's willing to pay for it.

SENATOR TAYLOR asked what would happen if it was transferred to a Native corporation that may have certain restrictions on the alienation of that property.

MS. GRACE said that was a good question, but she didn't have the answer.

CHAIRMAN TORGERSON asked if there were any further questions for Ms. Grace. There were none.

CHAIRMAN TORGERSON adjourned the meeting at 4:47 p.m.